BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN T. POFF	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,047,174
HAWKER BEECHCRAFT CORPORATION	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the March 16, 2010 preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein.

ISSUES

In the March 16, 2010 preliminary hearing Order, the ALJ awarded claimant benefits after concluding the claimant suffered a compensable injury.[1]

The respondent requests review of this preliminary hearing Order and alleges first that claimant's August 17, 2009 accidental injury was a natural and probable consequence of preexisting conditions, resulted from normal activities of day-to-day living or resulted from a personal risk. Second, respondent alleges the ALJ misapplied K.S.A. 44-508(f). Respondent requests the Board reverse the March 16, 2010 preliminary hearing Order.

The claimant requests the Board affirm the ALJ's preliminary hearing Order, arguing that the medical records, statements and uncontroverted facts establish the claimant sustained an on-the-job injury related to his work environment on August 17, 2009.

The issues are:

[1] The ALJ appointed Dr. Eyster as the authorized treating physician.

- Whether claimant sustained an accidental injury arising out of his employment with the respondent.

- Whether the ALJ misapplied K.S.A. 44-508(f).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant worked for the respondent for 22 years. Over the course of his employment, claimant experienced back problems, knee problems and hip problems. Claimant had filed several claims for these injuries, including his right knee, and received compensation. Claimant testified his right knee injury never completely healed.[2] According to the record, the only treatment claimant received for his *left* knee, prior to the August 17, 2009 accident, was an injection in January 2009.[3] Subsequent to this injection, claimant resumed working full time without any apparent problems with the left knee.

Claimant testified that after clocking out on August 17, 2009, and while still on the respondent's premises, he thought his right knee gave out, causing him to grab a railing.[4] This occurred on an exit ramp where a group of people was waiting to get out of a gate through a turnstile that allows only one person to go through at a time. The gate was malfunctioning, causing a backup of people waiting to exit. Claimant testified that after the incident occurred he had to be helped out to his car.

The day after the accident, claimant filled out an incident report for the respondent. Claimant wrote in the report that his right leg gave out and when it did, he grabbed the rail and twisted his knee.[5] Several days later, after seeing Dr. Robert L. Eyster, claimant returned to the respondent's nurse and asked to change the incident report. Claimant testified he needed to change the report because his right knee did not give out but, rather, he got stuck and twisted his left knee.[6]

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[2] P.H. Trans. at 31.

[3] The type of injection is not explained in the record.

[4] P.H. Trans. at 11.

[5] *Id.*, Resp. Ex. 1.

[6] *Id.*, at 13.

At the request of claimant's attorney, Dr. Pedro A. Murati evaluated claimant on December 3, 2009. He diagnosed claimant with (1) aggravation of low back pain with radiculopathy, (2) right SI joint dysfunction, (3) left patellofemoral syndrome, (4) aggravation of left knee sprain, and (5) peripheral neuropathy, not work related.[7] He opined that all the diagnoses but number 5 were a direct result from the August 17, 2009 work-related injury sustained by the claimant. Dr. Murati's notes state that claimant's shoe got stuck and he twisted his left knee.

Arising out of

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[8] Because the accident occurred while claimant was on the premises of his employer, the accident occurred in the course of claimant's employment. However, the accident must also arise out of the employment before it is compensable under the Kansas Workers Compensation Act.[9]

The phrase "out of" employment points to the cause or origin of the worker's accident and requires some causal connection between the accident and the employment. An accidental injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the resulting injury. An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[10]

In *McCready*,[11] the Kansas Court of Appeals explained that, when an employee falls at work, a court can determine whether any resulting injuries are compensable by considering the nature of the risk related to the fall. In discussing the different types of risks, the Court explained:

> Our Kansas Supreme Court recognizes three categories of risks in which injuries may occur . . . : (1) risks distinctly associated with the job; (2) risks which are

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[7] *Id.*, Cl. Ex. 1.

[8] K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

[9] See *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

[10] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[11] *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

> personal to the worker; and (3) neutral risks which have no particular employment or personal character.
>
> The risks falling in the first category are universally compensable. The risks falling in the second category do not arise out of employment and are not compensable. And the risks of the third or neutral category are compensable.[12]

The respondent argues that claimant's alleged injury resulted from a personal risk, his right knee giving out, and as such his injury did not arise out of his employment and is not compensable.

Claimant argues there is no indication of some personal risk of the claimant that caused the incident. He alleges he twisted his knee on an uneven ramp on the employer's premises.

For preliminary purposes, this Board Member finds that the incident was not due to a personal risk factor. Except for his initial report of his right knee "giving out," claimant has consistently reported and testified that he twisted his left knee. Additionally, Dr. Murati opined that claimant's diagnoses were a direct result from the work-related injury that occurred on August 17, 2009.

Activities of day-to-day living

Respondent asserts that even if claimant's injuries are deemed a new injury, the injury was a result of activities of daily living, which do not qualify as a personal injury pursuant to K.S.A. 44-508(e).

K.S.A. 2009 Supp. 44-508(e) states:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

A close reading of the statute reveals a reference to disability (not injury) which results from normal activities of day-to-day living. The respondent's argument fails to note the use of the word "disability" in this reference rather than "injury."

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[12] *Id.*, at 88, 89 (citations omitted).

A definition of "disability" cannot be found in the Workers Compensation Act. The Kansas Supreme Court in *Boeckmann*[13] found the claimant's disability was caused by his everyday activities. The medical evidence in *Boeckmann* showed that with every breath he took, his degenerative hip condition was getting worse. Thus, his disability was not caused by an injury but, rather, his disability was caused by being alive. Consequently, workers compensation benefits were denied.

More recently, the Kansas Court of Appeals in *McCready*[14] noted the use of the word "disability" in K.S.A. 44-508(e).

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee *suffers disability* as a result of the natural aging process or by the normal activities of day-to-day living.
>
> It is important to point out that the statute refers to a disability (not the injury) which is a result of the natural aging process or normal activities. . . .[15]

There is no evidence in the record compiled to date that suggests claimant suffers a disability as a result of the aging process or activities of day-to-day living. Neither party alleges a disability nor does a physician opine that claimant suffered a disability as a result of normal activities of day-to-day living.

"Going and coming" rule

The "going and coming" rule contained in K.S.A. 2009 Supp. 44-508(f) provides in pertinent part:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on

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[13] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[14] *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

[15] *Id.*, at 90 (alteration in original).

> the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

K.S.A. 2009 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[16] In *Thompson*, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[17]

But K.S.A. 2009 Supp. 44-508(f) contains exceptions to the "going and coming" rule, including that the "going and coming" rule does not apply if the worker is injured on the employer's premises.[18]

It is uncontroverted that claimant's accidental injuries were sustained while on respondent's premises. Consequently, the "going and coming" rule does not apply in the instant case.

New injury

The only medical opinion in the record to date is that of Dr. Murati. Dr. Murati clearly states that claimant's current diagnoses, except for one, are a direct result from the work-related injury that occurred on August 17, 2009, during his employment with Hawker Beechcraft. Although Dr. Murati's diagnoses indicate there is aggravation of low back pain and left knee sprain, which could imply aggravation of preexisting conditions, his clear opinion as to causation cannot be overlooked. He opines the diagnoses are a direct result of the August 17, 2009 injury. Accordingly, this Board Member finds and concludes based

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[16] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

[17] *Thompson v. Law Office of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[18] *Id.*, at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area, controlled by the employer.

on the evidence compiled to date and for preliminary hearing purposes that the claimant sustained a new injury on August 17, 2009.

CONCLUSION

This Board Member finds and concludes for preliminary hearing purposes and based upon the record compiled to date that claimant sustained an accidental injury arising out of his employment with the respondent.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[19] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of ALJ Thomas Klein dated March 16, 2010, is affirmed, albeit for different legal reasons.

IT IS SO ORDERED.

Dated this ____ day of May, 2010.

CAROL L. FOREMAN
BOARD MEMBER

c: Michael L. Snider, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[19] K.S.A. 44-534a.